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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 163.

CHARLES GAGNON, APPELLANT,

vs.

THE UNITED STATES AND THE SIOUX AND CHEYENNE INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 3, 1906.

(18,742.)

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1 In the Court of Claims.

CHARLES GAGNON v. THE UNITED STATES and THE SIOUX AND Cheyenne Tribe of Indians.	No. 10380. Indian Depredation.

I.

(*Original Petition, Filed March* 1, 1894.)

Amended Petition.

(Filed April 10, 1902.)

To the honorable the Court of Claims:

The claimant, Charles Gagnon, respectfully represents:

I. That he is and was on the dates hereinafter mentioned a citizen of the United States and a resident of Rulo in the State of Nebraska.

II. That James W. Hosford and your petitioner were at the date hereinafter mentioned partners, doing business under the name of Hosford & Gagnon.

III. That the following property of the value of $15,500 was taken from said firm of Hosford and Gagnon, both members of which were at the date of the depredation citizens of the United States, by Indians of the Sioux and Cheyenne tribes or nations of Indians, which were then in amity with the United States and who were chargeable for said depredation by reason of a treaty between said Indians and the United States, about the 17th day of February, 1866, in the Territory of Wyoming, to wit: 9 head of
2 American horses, 18 head of mules, 159 head of cattle. Of this property so taken James W. Hosford owned one-half and the other half was owned by your petitioner Charles Gagnon, for which he here makes claim.

IV. That no claim for said property was presented to the Commissioner of Indian Affairs.

The claimant is the sole owner of this claim and the only person interested therein; and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true. And the claimant prays judgment upon the facts and the law in the sum of seven thousand seven
r and fifty dollars.

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

William B. King, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my information, knowledge and belief.

WILLIAM B. KING.

Subscribed and sworn to before me this 10th day of April, 1902.

MARIE A. SEARLES,
[SEAL.] *Notary Public.*

3 II.—*General Traverse.*

And now comes the Attorney-General on behalf of the United States and answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.

JOHN G. THOMPSON,
Assistant Attorney-General.

III.—*Findings of Fact and Conclusion of Law.*

Filed December 1, 1902.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

Indians of the Sioux and Cheyenne tribes took property from the firm of Hosford & Gagnon, in the Territory of Wyoming, February, 1866, of the aggregate value of $15,500. The depredation was without just cause or provocation on the part of the owner or agent in charge.

II.

One half of the property so taken was owned by James W. Hosford, for which he had maintained suit under No. 3912 in this court and recovered judgment in the sum of $7,750, which judgment has been satisfied. The other half of the property so taken, amounting to $7,750, was owned by the claimant, Charles Gagnon, which half has not been returned or paid for.

III.

The Indians by whom the property was taken were members of a tribe in amity with the United States at the date of the depredation.

IV.

The claimant was born in Canada, a subject of the British Crown. He declared his intention to become a citizen of the United States

before the district court of Woodbury county, Iowa, March 12, 1858. It is claimed that he was admitted to become a citizen of the United States by the district court of the first judicial district of the Territory of Nebraska, within and for the county of Richardson, on the 25th day of September, 1863. The judge and clerk of said territorial court died before the proceedings were had in March,
4 1897, for the *nunc pro tunc* order. To establish his citizenship the claimant relies exclusively upon the following record, made by the district court for the first judicial district of the State of Nebraska (successor of said district court of the Territory), on application made March 29, 1897:

"Be it remembered that at a term of the district court holden in and for said county, in Falls City therein, on the 29th day of March, in the year of our Lord one thousand eight hundred and ninety-seven, the following among other proceedings were had, to wit:

"*In re* CHARLES GAGNON, Application and Motion, *nunc pro tunc*, to Supply Record of Naturalization as a Citizen of the United States.

"This cause came on to be heard on motion of Charles Gagnon for an order *nunc pro tunc* to supply omission in the record wherein the judgment of naturalization of the said Charles Gagnon as a citizen of the United States pronounced by this court at its September term, A. D. 1863, was through negligence or inadvertence of the clerk unrecorded in the journal of said county, or if recorded the same has been lost or destroyed; and it appearing to the court by competent evidence that the said Charles Gagnon made application to this court at its September term, 1863, to be naturalized as a citizen of the United States, and having produced his certificate of his declaration of intention to become a citizen of the United States, made before the clerk of the district court for Woodbury county, in the State of Iowa, on March 12th, 1858, and that he thereupon produced in open court his witnesses, to wit, E. H. Johnson and John C. Blair, and after hearing the testimony of said witnesses as to the qualification of said Charles Gagnon to become a citizen of the United States, and the court being satisfied in the premises, granted an order admitting said Gagnon to such citizenship and administered to him the oath of allegiance required by law, and abjuration of all allegiance to Queen Victoria, Queen of England, of whom he was formerly a subject.

"And it having been made to appear further to this court that said judgment of naturalization was never recorded, and if recorded the record is lost and can not be found in the records of this court, and it being legal and proper that said record should be supplied, and this court being willing that said error or omission should be corrected, it is ordered and adjudged that said judgment so rendered by this court at its September term, 1863, be entered at large on the journal of this court as of the date when it should have been entered, to wit, on the 25th day of September, 1863, and that the clerk issue to the said Charles Gagnon the proper certificate of natu-

ralization as provided by law, and that this applicant pay the costs of this proceeding.

"JNO. S. STULL,
"*Judge District Court.*

"March 30th, 1897.

"UNITED STATES OF AMERICA, }
"*The Territory of Nebraska, Richardson County,* } ss:

"Be it remembered that at a term of the district court holden in and for said county, in Falls City therein, on the 25th day of September, in the year of our Lord one thousand eight hundred and sixty-three, *was* present the Honorable E. S. Dundy, sole presiding judge, John P. Welty, sheriff of said county, and George Vanderventer, clerk of said court, when the following, among other proceedings, were had to wit: Charles Gagnon, a native of Canada, and at present residing within said Territory, appeared in open court and made application to be admitted to become a citizen of the United States, and it appearing to the satisfaction of the court that he had declared on oath before a clerk of the district court of Woodbury county, Iowa, a court of record having common-law jurisdiction, and using a seal, two years at least before his admission, that it was *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance to any foreign prince, potentate, State or sovereignty whatsoever, and particularly to Queen Victoria, Queen of England, of whom he was heretofore a subject; and said applicant having declared on oath before this court that he will support the Constitution of the United States, and that he doth absolutely and entirely renounce and adjure all allegiance and fidelity to every foreign prince, potentate, State or sovereignty whatsoever, and particularly to the power above named, the court being satisfied that said applicant has resided within the United States for the term of five years next preceding his admission, without being at any time during the said five years out of the territory of the United States, and within this State one year at least; and it further appearing to the satisfaction of this court that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same;

"Whereupon it is orderd by the court that the said Charles Gagnon be, and he is hereby, admitted to become a citizen of the United States.

"In testimony whereof I, George Vanderventer, clerk of the court aforesaid, have hereunto set my hand and affixed the seal of said court, at my office in Falls City, in said county, September 25th, 1863.

[SEAL.] "GEORGE VANDERVENTER,
"*Clerk of the District Court.*

"STATE OF NEBRASKA, }
"*Richardson County,* } ss:

"I, Chas. L. Mettz, clerk of the district court in and for the above-named county and State, do hereby certify that the within and foregoing is a true and perfect copy of the order and decree of the court rendered at the March, A. D. 1897, term of the district court, to wit, on the 30th day of March, 1897, as the same appears on the court records of said county, to wit, on Journal 10, pages 218, 219, and 220.

"Witness my official hand and seal this the 3rd day of April, A. D. 1897.

[SEAL.]

"CHAS. L. METTZ,
"*Clerk of the District Court.*

"STATE OF NEBRASKA, }
"*Richard[illegible] County,* } ss:

"I, Jno. S. Stull, judge of the district court of the first judicial district of the State of Nebraska, do hereby certify that the above-named Charles L. Mettz is the clerk of said court in and for said Richardson county, State of Nebraska, and as such clerk he is the custodian of the records and seal of said court; that said Richardson county is a part of said first judicial district of the State of
6 Nebraska; that the above and foregoing authentication is in due form and in all respects in accordance with the laws of the State of Nebraska.

"Witness my hand this 12th day of May, 1897.

"JNO. S. STULL,
"*Judge of the District Court of the 1st Judicial*
"*District of the State of Nebraska.*"

Prior to said application, to wit, on March 19, 1897, the following notice was served on the Attorney-General:

"MARCH 19, 1897.

"Hon. Joseph McKenna.

"SIR: In further response to the letter of February 10, 1897, by Charles W. Russell, acting Assistant Attorney-General in charge of Indian depredation claims, we now advise you that application will be made to the district court of Richardson county, Nebraska, on the twenty-ninth day of March, 1897, on behalf of Charles Gagnon, for restoration of certain lost records relative to the naturalization of said Gagnon.

"You will please take notice of this proceeding, as it is the purpose of the claimant in causes Nos. 3912, 3913, 10379, 10380, and 10382, Indian depredation, in the Court of Claims, to present duly authenticated copies of said restored record (should it be restored) as evidence on behalf of claimants.

"Very respectfully,

"CHARLES AND WM. B. KING."

V.

A search of the records of the district court of Richardson county, Nebr., at Falls City, made by a special attorney of the Department of Justice, and admitted as evidence by agreement of parties, discloses the following facts:

"From the organization of the court down to and including the year 1862, the records are complete and include an appearance docket, a trial calendar upon which is docketed every case that was tried, and upon which also *is* shown the minutes made by the judge at the time the cases were heard. There are also journals of the court in which are spread at length the orders entered in the various cases tried. Subsequent to the year 1863 there are also appearance dockets, trial dockets, and journals, kept in practically the same form as at present, showing the action of the court, as in those prior to 1863. The appearance docket covering the year 1863 is one which was begun prior to that year, and which covers the year 1862. It also covers the year 1864 and several years subsequent thereto. This appearance docket, however, shows but the entry of five cases during the year 1863. The cases at that time were docketed three upon a page, and there are numerous blank pages after the docketing of the last five cases for 1863, before the docketing of the first case in 1864. The first trial docket made up after the year 1862 has upon it each of the five cases appearing upon the appearance docket for 1863, and also shows forty-seven other cases docketed during the year 1863, but not appearing upon the appearance
7 docket. Some of these show, however, that they are petitions for new trial, cases appealed from justice court, motions for confirmation of sheriff's sales, transfers of cases from other counties, and other proceedings which an inspection of the appearance docket shows it evidently was not the custom to place upon the appearance docket. Deducting matters of this nature from the full number of cases docketed upon the trial docket which had been filed in 1863 leaves such a number of cases as should have appeared upon the appearance docket as could be docketed upon the pages left blank in the appearance docket between the cases docketed in 1863 and those docketed in 1864.

VI.

There is no record or memorandum or other paper of any kind in the records of said court or among the files thereof showing or relating to an application by Charles Gagnon for naturalization before said district court, nor was there any such paper in the records of said court on the 29th and 30th days of March, 1897, when the proceedings for restoration of the record of naturalization were taken, nor does it appear that a certificate of naturalization was ever issued or delivered to the claimant.

VII.

Upon the foregoing findings of fact the court finds the ultimate fact, so far as it is a question of fact, that the claimant, Charles Gag-

non, was not at the time of the depredation a citizen of the United States.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant not having been a citizen of the United States at the time when the depredation was committed, this court has not jurisdiction, and the petition is therefore dismissed.

IV.—*Opinion of Court of Claims.*

Filed December 1, 1902.

PEELLE, *J.*, delivered the opinion of the court.

The question presented is: Was the claimant a citizen of the United States at the date of the depredation complained of in February, 1866?

The claimant grounds his right to citizenship on the facts set forth in finding IV, which in brief are that he was born in Canada; declared his intention to become a citizen of the United States before the district court of Woodbury county, Iowa, in March, 1858, and claims that thereafter on September 25, 1863, he was admitted by the district court of Richardson county, in the Territory of Nebraska, to become a citizen of the United States, but no record appears to have been made thereof.

Some thirty-three years thereafter, on the application and motion of the claimant before the district court of said county for an order *nunc pro tunc* to supply the record of his naturalization as a citizen of the United States, on the ground that the judgment of naturalization "was through the negligence or inadvertence of the clerk unrecorded in the journal of said county, or if recorded the same has been lost or destroyed," the court found that the claimant had been admitted to citizenship on September 25, 1863, and ordered that the judgment thereof be entered at large on the journal of the court *nunc pro tunc* as of the date aforesaid.

8 The question of the claimant's naturalization, as well as the existence of the record thereof, or of any memorandum paper pertaining thereto, as the basis for the court's jurisdiction, is controverted by the defendants, and in support of their contention they rely on the facts set forth in findings V and VI, which, in substance, are that the records of the district court of the Territory of Nebraska for the year 1863, and prior and subsequent thereto, are now complete and intact, showing entries in sundry cases at the various terms of said court during that period, but no record of any proceedings showing the naturalization of the claimant.

That no memorandum or other paper of any kind was in the records of said court on the 29th and 30th of March, 1897, when the proceedings for the restoration of the records of naturalization were

taken, and that it does not appear that a certificate of naturalization was ever issued or delivered to the claimant.

The issue thus made raises the question, Did the district court of Richardson county, Nebr., in 1897, have jurisdiction to supply the alleged record of naturalization of September, 1863, by a *nunc pro tunc* order?

If it did, then this court is bound thereby and the claimant, being a citizen at the date of the depredation, is entitled to recover the sum of $7,750 found due him as set forth in finding II; otherwise citizenship being jurisdictional under the act of March 3, 1891 (26 Stat. L., 851), the claimant's petition must be dismissed.

From the facts found it is clear that the *nunc pro tunc* order of 1897 supplying an unrecorded judgment of naturalization alleged to have been rendered in 1863 was based entirely upon oral testimony. The court's records of 1863 are not only silent as to what was done, but no paper or memorandum of any kind was among the records or before the court in 1897 from which the court could infer that such a proceeding had been commenced. The proceedings in 1897 therefore were not to amend a defective or incomplete record of which there was some basis to show a mistake, but were to supply an alleged omitted record in a matter wherein the record and files of the court not only fail to show that any proceedings were had, but fail to show that any such proceedings had been commenced.

Blackstone in his Commentaries, volume 3, page 407, in speaking of writs of error says: "Formerly the suitors were much perplexed by writs of error brought upon very slight or trivial grounds, as misspelling and other mistakes of the clerks, all which might be amended at common law, while all the proceedings were in paper, for they were then considered as only in *fieri* and therefore subject to the control of the courts. But when once the record was made up it was formerly held that by the common law no amendment could be permitted, unless within the very terms in which the judicial act as recorded was done; for during the term the record is in the breast of the court, but afterwards it admitted of no alteration. But now the *the* courts are becoming more liberal and, where justice requires it, will allow of amendments at any term while the suit is depending, notwithstanding the record is made up and the term be passed. For they at present consider the proceedings as in *fieri* until judgment is given, and therefore that till then they have power to permit amendments by the common law; but when judgment is once given and enrolled, no amendment is permitted in any subsequent term."

The origin and history of the general doctrine of amend-
9 ments as outlined in that commentary, page 408, are well stated in the case of *Bilansky v. State of Minnesota* (3 Minnesota, 427–429).

In that case, which was a capital one, the court said: "If a jury is sworn according to law, or any other of the ordinary proceedings take place in the progress of the trial of a cause, and the clerk omits to record the fact, we see no reason why the record should not be

made to conform to the truth, even after the term, when there exists no doubt about what the truth is. Every reason is in favor of such change being made; public justice demands it, as well for the punishment of the offender as for the protection of the accused, according as the nature of the proposed amendment may operate."

Bishop on Criminal Law, section 1160, says: "When the term of the court has closed, it is too late to undo, at a subsequent term, what was done at the former term. A judgment of the court, for instance, cannot then be opened and modified or set aside. Neither, it has been held, can the clerk at a subsequent term make an entry of what truly transpired at the preceding term. But this refers to the power of the clerk, proceeding of his own motion. The court may order *nunc pro tunc* entries, as they are called, to supply some omission in the entry of what was done at the preceding term; yet this is a power the extent of which is limited and not easily defined. In general, mere clerical errors may be amended in this way. So of the mistake of the clerk in the name of the judge before whom the indictment was found."

In the case of *In re Wight* (134 U. S., 136–144), the court, after quoting the above section, says: "The present case comes within the clause of this section which declares the power of the court to make *nunc pro tunc* entries to supply omissions in the record of what was done at the time of the proceedings. An extensive list of authorities is cited in the footnote of Mr. Bishop, and among those which support the power of the court to make a record of some matter which was done at a former term, of which the clerk has made no entry, the following cases directly affirm that proposition: *Galloway, administrator, v. McKeithen*, 5 Ired. (Law), 12; *Hyde v. Curling*, 10 Mo., 374; *State v. Clark*, 18 Mo., 432; *Nelson v. Barker*, 3 McLean, 379, and *Bilansky v. The State of Minnesota*, 3 Minnesota, 427."

In the case of *Hyde v. Curling* (*supra*), which was a civil suit, it was held, as stated in the syllabus, that "a court has power to order entries of proceedings had by the court at a previous term to be made *nunc pro tunc*, but where the court has omitted to make an order which it might or ought to have made, it cannot at a subsequent term be made *nunc pro tunc*." And in the case of *Nelson v. Barker* (*supra*), where an objection was made to the amendment on the ground that there was nothing to amend by, the court said: "At common law the court could only give leave to amend when there was something to amend by, and anciently amendments were required to be made at the term at which the error occurred, but now an amendment may be made at any time before judgment, and in some cases after judgment." But that ruling appears to be based on section 32 of the judiciary act of 1789, known as the statute of jeofailes and amendments of the United States now embodied in Revised Statutes, section 954.

So that the reliance by the claimant's counsel on the case of *In re Wight, supra*, to support the doctrine that the court is not re-

10 stricted to record evidence in amending its record after the term at which the proceedings were had does not appear to be well founded, as the court, citing section 954, saying, "it is as liberal in the powers which it confers on the courts to make amendments as any of those enacted in more modern times," adds that, "we are forced to the conclusion that the action of the circuit court in making the order for a *nunc pro tunc* record, which showed that the case had been remanded from that court to the district court prior to the time when the sentence was passed upon the prisoner, was a legitimate exercise of power."

It will thus be seen that the language in that opinion, saying in effect that the court is not restricted to record evidence in amending its record at a subsequent term, must be read in connection with section 954.

The supreme court of Indiana has been uniform in its holding that after the expiration of the term *nunc pro tunc* entries to amend the record of a proceeding at a prior term can only be made upon some record or memorandum paper or other minutes in the case from which it can be clearly shown what took place. (*Boyd v. Blaisdell*, 15 Ind., 73; *Jenkins v. Long*, 23 Ind., 460; *Makepeace v. Lukens*, 27 Ind., 437; *Hamilton v. Burch*, 28 Ind., 233; *Miller v. Royce*, 60 Ind., 189, and *Schoonover v. Reed*, 65 Ind., 313.)

In the last case cited the court, quoting from the case of *Wilson v. Vance* (55 Ind., 394), said: "The office of a *nunc pro tunc* entry is to make a record of what was previously done, but not then entered; not to make an order, now for then, but to enter, now for then, an order previously made.

That is to say, the function of a *nunc pro tunc* entry is to enter now for then the order previously made and not to make an order now to supply the court's omission to make one then.

To the same effect also are the decisions of the supreme court of Illinois. (*Coughram v. Gutcheus*, 18 Ill., 390, approved in 94 Ill., 525, and 165 Ill., 417.)

In the case of *Balch v. Shaw* (7 Cush., 282–284), in speaking of the power of the courts during and after the term to correct clerical errors, the court said: "There can be no doubt that it is competent for a court of record, under its general, inherent, and necessary authority, to correct the mistakes and supply the defect of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case, and that this may be done at any time as well after as during the term, *nunc pro tunc*. The length of time in this case, between the granting of the license and making up the record, does not take away the right or jurisdiction of the court." But the court further said: "This was not a case of want of jurisdiction, in which the record can not be amended, because, there being an omission to act, there is nothing to record; in such case the defect is not in the record, but in the action of the court."

The converse of that appears to us to apply to the present case; that is to say, there was nothing before the court making the *nunc pro tunc* entry to show that it was the entry of an order previously

made. There was no record or memorandum of any kind before the court from which it could be inferred that the proceedings for the naturalization of the claimant had taken place or had ever been commenced, and for that reason the court's jurisdiction was wanting unless the omission of such record and paper can be supplied by the recollection of witnesses a generation thereafter.

Furthermore, the matter was not in the breast of the court,
11 for the judge who held the court in 1863, as well as the clerk thereof, had theretofore died.

The proposition that a record can not be amended after the term unless there is something in the record to amend by is supported by many cases, other than those cited, some of which are *Lynch v. Reynolds*, 6 Bush. (Ky.), 547; *Shackleford v. Levy*, 63 Miss., 128; *Smith v. Hood*, 25 Pa., 218; *State ex rel. v. Prim*, 61 Mo., 166, and many other cases which might be cited.

Such was the view of Bishop in regard to the manner of making amendments, for in his Criminal Procedure, section 1345, he says: "The better way is believed to be to make, in the record of the term at which the amendment is offered, an entry to the effect that, *whereas on inspection of the record of the preceding term an error therein appears*, etc., it is considered that the same be corrected and amended, etc., setting out the amendment."

True, in the case of *Balch v. Shaw* (*supra*) it is said: "It was further said in argument that there was no sufficient material from which to make up the record. But the court of common pleas, having exclusive right and jurisdiction in the matter, were the proper judges of the necessity and propriety of extending the record, and of the proofs and of the sufficiency of the proofs upon which to proceed."

That was said with reference to the issue in that case, which was one of law, there being no question of fact in dispute, and that was that "if the court should be of the opinion that there was a sufficient record of the order of the court of common pleas, made at the October term, 1824, to sell the demanded premises, judgment should be rendered for the tenant," who was relying on the order then made to support his title acquired by purchase at the sale thereunder.

The court held that there "was a sufficient record of the order of the court of common pleas" to sell the premises, and hence there was no question of jurisdiction; and the court of common pleas having, as the court say, "the exclusive right and jurisdiction in the matter," such court was the judge "of the proofs and of the sufficiency of the proofs upon which to proceed."

In the case of *Fay v. Wenzell* (8 Cush., 315), which was a case of assumpsit on a promissory note, where the jury returned a verdict for the plaintiff and the defendant moved for a new trial, as appears from a written motion filed in the case, no entry of the motion appeared on the docket, but there was an indorsement on the motion for a new trial made by the judge before whom the motion was argued, directing, in substance, that the motion should be overruled and judgment be entered upon the verdict, but no entry thereof was

made on the docket. After the indorsement of the motion as aforesaid the case was continued from term to term.

The plaintiff contended that the entry was erroneous and had been made by mistake, and offered parol evidence thereof in addition to the written motion and the indorsement thereon, while the defendant insisted that the memorandum on the docket constituted the record of the proceedings in the case, and denied the authority of the court to alter and annul the record of the doings of the court at a former term, and also objected to the competency of the evidence offered by the plaintiff; but the presiding judge overruled the objections and received the evidence and entered on the docket

12 the following order: "And now it appearing to the court here that the entry on the docket at the December term, 1848, 'verdict set aside, new trial granted,' is erroneous and was made by mistake, and that no such order was ever made by the court, it is now ordered that the said minute be struck out and erased; and it also further appearing that the entry in the docket at the December term, 1849, 'judgment on the verdict' is erroneous, and that the same ought to be arrested, it is ordered by the court here that the said minute be struck out and erased. And now at the present term of court it is ordered and determined by the court that the motion of the defendant for a new trial be overruled and disallowed, and that judgment be now entered on the verdict."

On appeal, the court, among other things, said: "In the present case the court of common pleas had the power to order this amendment of the record. The amount and kind of evidence requisite to satisfy that court, as to what was the real order of the court and what was the proper entry on the docket or extended record, must rest with that court. Having the authority to correct their own record, it is to be presumed that any amendment of the record made by them will be in accordance with the facts." There it will be observed there were papers among the files and indorsements thereon which gave the court jurisdiction in the premises, and jurisdiction once acquired the court could admit such evidence, oral or otherwise, as it saw fit to ascertain the truth of the matter.

The claimant's counsel ably contend, and cite numerous authorities to support their contention, that a court of record has the inherent right and power to make *nunc pro tunc* entries to correct mistakes so as to conform its record to the actual truth of past transactions; and that contention, in view of the numerous authorities, both of the Supreme Court of the United States and of the several States, cannot be controverted. But the authorities cited by the claimant, as well as others we have examined, are all in cases where it appeared from the record that a cause was pending, and in many cases there was some memorandum, minute, or indorsement on the records or on the papers among the files sufficient to give the court jurisdiction to proceed; and where there is sufficient substance the record may be supplemented by oral testimony, but where there is a total absence of substance—*i. e.*, no record, paper, or memorandum—from which it could be inferred that any such proceeding was even

commenced, there is nothing to amend. Hence the alleged certificate of naturalization in this case purporting to be "an order *nunc pro tunc* to supply omission in the records wherein the judgment of naturalization" of the claimant as a citizen of the United States pronounced by the court at its September term, 1863, and which it is claimed was through negligence or inadvertence of the clerk unrecorded, or if recorded, lost or destroyed, is not conclusive, and may properly be attacked in this court. (*Thompson v. Whitman*, 18 Wall., 457; *Cole v. Cunningham*, 133 U. S., 107; *Simmons v. Saul*, 138 U. S., 439, 448.)

While lapse of time in a proper case may not take away the right or jurisdiction of a court to make *nunc pro tunc* entries to conform its record to the truth, it is an element to be considered in this case, where there is a total absence of any record showing that the claimant ever applied to become a citizen, and hence the *nunc pro tunc* entry was rather an original order made now for then than an entry made now for then of an order previously made.

13 In the case of *Brown v. Coward* (3 Hill, S. C.), where the clerk had made no entry on the minutes of the court of a judgment in summary process, it was held that there was nothing on which a *scire facias* to revive could issue; nor would a motion to amend by entering judgment *nunc pro tunc* be granted for the reason that there was no judgment to amend; that "where judicial proceedings are imperfect, the court to which they belong will amend them, as long as there is anything to amend." That language is (J. R.) applicable to the present case. There is no substance upon which to ground a right to amend, especially after the lapse of a generation.

Therefore the authorities cited by the claimant in support of the proposition that the certified copy of the record of naturalization of an alien, like any other record of a court, imports verity, are not in point, for the reason that there was nothing in the record or among the files of the court to show that any such judgment had either been entered or ordered to be entered. There was nothing to amend—no mistake to correct.

No certificate of naturalization appears to have been issued to the claimant at the time he claims to have been naturalized, and hence the beginning of the proceeding as well as the action of the court rests solely in the recollection of witnesses. Therefore, we are not disposed to accept the certificate of the *nunc pro tunc* judgment of naturalization as sufficient to establish the claimant's citizenship, and his petition will accordingly be dismissed.

Howry, J., did not sit in this case and took no part in the decision.

14 V.—*Judgment of the Court.*

CHARLES GAGNON
vs.
THE UNITED STATES and THE SIOUX AND Cheyenne Indians. } No. 10380. Indian Depredation.

At a Court of Claims held in the city of Washington on the first day of December 1902 judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants and do order, adjudge and decree that the petition of the claimant Charles Gagnon be dismissed.

BY THE COURT.

15 VI.—*Appeal to the Supreme Court of the United States and Allowance of Same.*

In the Court of Claims, December Term, 1902.

CHARLES GAGNON
v.
THE UNITED STATES ET AL. } No. 10380. Indian Depredation.

Appeal.

Now comes the claimant, Charles Gagnon, and appeals to the Supreme Court of the United States, from the judgment of this court, entered on the first day of December, 1902, dismissing his petition, and moves for an allowance of this appeal.

WM. B. KING,
Attorney for Claimant.

Filed December 3, 1902.

The aforesaid application for the allowance of appeal having been filed in open court, December 3, 1902, it was ordered that the same be allowed as prayed for.

BY THE COURT.

Court of Claims.

CHARLES GAGNON
v.
THE UNITED STATES ET AL. } No. 10380. Indian Depredation.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings on the above entitled cause, of the findings of fact and conclusion of law filed by the court, of the opinion of the court, of the judgment

of the court, of the application for and allowance of appeal
16 to the Supreme Court of the United States.

In testimony whereof, I hereunto set my hand and affix the seal of said Court of Claims this 8 day of December, 1902.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

Endorsed on cover: File No. 18,742. Court of Claims. Term No. 163. Charles Gagnon, appellant, *vs.* The United States and The Sioux and Cheyenne Indians. Filed December 8th, 1902.